Supreme Court, U. S.
FILED
JUN 19 1980
MICHAEL RODAK, JR., CLERK

IN THE
UNITED STATES SUPREME COURT

NO. 79 - 1750

ROBERT E. FINGAR,

Petitioner,

versus

SEABOARD COAST LINE RAILROAD COMPANY, a VIRGINIA corporation,

Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OF ROBERT E. FINGAR
Petitioner
P. O. Box 552
Callahan, Florida
32011

Pro se

Comes now Petitioner, Robert E. Fingar, and replies to Respondent's opposition to Petition for Writ of Certiorari with the following brief:

I. PETITION FOR WRIT OF CERTIORARI CITES SUFFICIENT AUTHORITY AND GROUNDS FOR INVOKING THIS COURT'S JURISDICTION AND DEMONSTRATES APPELLATE COURT'S DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDURE

1. The authority for invoking this Court's jurisdiction is predicated on the provision of the Railway Labor Act, as amended, 45 USCA, Section 153 First (q), and the Petition for Writ so indicates such statutory authority, and, this Court's Rule 23(1)(iii) and captioned (The Petition for Certiorari) distinguishes that statutory authority is the primary authority for invoking this Court's jurisdiction.

2. The grounds for invoking this Court's jurisdiction is that the appellate Court for the United States Fifth Circuit departed from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision so that Petitioner's right to due process of law is not denied, and, the Petition for Writ of Certiorari so indicates such grounds.

3. The appellate Court's departure from the usual course of judicial proceedings is demonstrated by its panel deciding (contrary to the United States District Court's statutory jurisdiction to do so) Petitioner's grievance with the untimeliness term of the order for Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273. This departure is demonstrated in the Petition for Writ of Certiorari.

In statute, pursuant to the Railway Labor Act, as amended, 45 USCA Section 153 First (q), jurisdiction on petition for review brought by either party who is grieved by the terms of an award entered by any division of the Adjustment Board is vested in the district courts of the United States, and, pursuant to paragraph (q) of said section, the district Court upon review shall have jurisdiction to affirm the order of the division or to set it aside for failure to comply with the requirements of this Act.

Here, the Petition for Writ of Certiorari distinguishes that the district Court neither affirmed nor set aside the order of the division, rather, at the urging of Respondent, district Court entered summary judgment in favor of Respondent on the ground of res judicata and dismissed the claims premised in Award No 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

Pursuant to the principle of res judicata, the district Court had no choice but to dismiss the case, for no issue can be litigated when res judicata is determined to exist.

Upon determination by appellate Court that res judicata did not exist, this did not give appellate Court jurisdiction to determine the timeliness issue on which Petitioner brought this case into the United States District Court and thereby use such decision for affirming district Court's summary judgment for respondent.

Upon determing that res judicata did not exist, the appellate Court should have reversed the district Court's summary judgment and sent the case back to the district Court for judgment on Petitioner's grievance with the timeliness term of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

4. Moreover, appellate Court's departure from the usual course of judicial proceeding is demonstrated byits affirming district court's

summary judgment when there are genuine issues of material fact on timeliness pending in the district Court for a decision by the district Court pursuant to the requirements of the Railway Labor Act, as amended, 45 USCA Section 153 First (q), and, the Petition for Writ of Certiorari distinguishes this departure.

Rule 56(c), Federal Rules of Civil Procedure on summary judgment prohibits the granting of summary judgment as a matter of law when there are genuine issues as to material facts for the district court to decide, and the Petition for Writ of Certiorari distinguishes this prohibition, and this prohibition has been affirmed by the Federal Appellate and District Courts for New York - GOVERNMENT OF INDIA v. CARGILL, Inc., (1978) 445 F. Supp. 714, and , this citation is used as one of the current annotations for said Rule 56(c) and for said paragraph (q) of said ACT.

II. RESPONDENT'S CASE CITATIONS ARE IRRELEVANT FOR OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

The case citations used by Respondent in opposition to granting petition for writ of certiorari are based on the precept of the lower Court's judgment being correct. This precept of correctness does not exist for the judgment on which the application for certiorari is made, and this reasoning is elementary:

1. The district Court's summary judgment was grounded in res judicata and was premised on Petitioner's claim against Respondent to rights to runs and for reinstatement to Respondents service rather than being premised on Petitioner's grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

2. As previously stated, the Railway Labor Act, as amended, 45 USCA Section 153 First(q) is the basis for jurisdiction in the district Court and such jurisdiction does not permit district Courts to premise a judgment on the merits on Petitioner's claims agains the Respondent , and, the United States Court of Appeals for the Nineth Circuit refused to do so upon the encourgement of the Baltimore and Ohio Railroad to so do in System FEDERATION, No. 30, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, et al Plaintiffs v. BRIADWOOD et al., Defendants (1968).

Such refusal was grounded on the precept that an incorrect judgment would be the result because the B & O would be getting what it considered a correct judgment and to which the Nineth Circuit Court determined would be the wrong way.

3. The Railway Labor Act, as amended, 45 USCA Section 151, under " GENERAL PURPOSE " defines the purpose of said Act to be for the peaceful resolvement of disputes between employee and employer.

A Petition for Review in the United States District Court is one of the steps involved in such revolvement for dispute resolvement.

Here, Petitioner has been denied the Petition for Review step by the district Court entering a summary judgment premised on Petitioner's claims against Respondent rather than being premised by law on Petitioner's grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

Likewise, the Fifth Circuit Court's judgment affirming district Court's summary judgment is incorrect because it also premises its judgment on Petitioner's claim against Respondent rather than on his grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

Thusly, summary judgment as entered by the district Court and as affirmed by the Appellate Court for the United States Fifth Circuit, both are incorrect, for both are premised on Petitioner's claim against Respondent and to such claims, neither Court has jurisdiction under said Act.

The district Court said litigation of such claims were barred by res judicata. and, the appellate Court for the United States Fifth Circuit said the review of such claims could not be had until contractual requirements had been met.

Neither review or litigation of such claims against Respondent is sought in this action, only Petitioner's grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board is sought to be administered,United States District Court, and, this is done, pursuant to Section 153 First(q) of said Act, by filing a Petition for Review in a distrct Court to review the terms of an order of a Division of the National Railroad Adjustment Board and not by Petition to Review claims premised in such Division's ORDER.

III. APPELLATE COURT FOR THE UNITED STATES FIFTH CIRCUIT WAS NOT BRIEFED ON THE RECORD FOR ISSUES OTHER THAN RES JUDICATA

The Respondent opposes the granting of the Petition for Writ of Certiorari on the premise that appellate Court had entire record before it and thereby did not depart from the usual course of appellate review.

It is true that the entire record was before appellate Court, but, the parties had not briefed the appellate Court or district Court on any issue other than-res judicata which is due to the fact, as previously stated, that under the principle of res judicata no issue may be litigated when res judicata is found by the district Court.

The opinions of both Courts hereof reflect no adjudication on any issue other than res judicata in the distrct Court. Likewise, the briefs of both parties stipulate that their briefs' are only on the issue of res judicata and further reflect that res judicata is the only issue adjudicated by the district Court and that res judicata is the only issue on appeal to the appellate Court.

As previously stated, Section 153 First(q) of said ACT, limits appellate review to issues adjudicated by the district Court, and, appellate Court found district Court had only acted on the issue of res judicata and not on the issue of untimeliness before it, and, thence, appellate Court entered the statutorily jurisdictional realm of the district Court and decided an issue of material fact pending before the district Court and used such decision for affirming district Court's summary judgment on the issue of res judicata.

This depature is prohibited by the Railway Labor Act, as amended, 45 USCA Section 153 First (q); said departure has deprived Petitioner of his statutpry right to a district Court review of his grievance with the terms of the order for Award No 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273, and, therefrom, the Petition for Writ of Certiorari should be granted rather than denied as respondent would urge.

Respectfully submitted,

Robert E. Fingar
Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply has been served to Mr. Gary A. Bubb, 1000 Barnett Bank Building, Jacksonville, Florida 32202-, counsel for the Respondent, this 15th day of June, 1980, by United States Mail.

Robert E. Fingar
Petitioner